

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Blackhawk Energy Services, L.L.C.)	
)	01-0174
Application for Certificate of Service)	
Authority under Section 16-115 of the)	
Public Utilities Act.)	

**Verified Response of Blackhawk Energy Services, L.L.C.
to the Report of the Staff of the Illinois Commerce Commission**

Blackhawk Energy Services, L.L.C. (“Blackhawk”), by its attorneys Piper Marbury Rudnick & Wolfe, hereby submits to the Illinois Commerce Commission (“Commission”) its verified response to the Report of the Staff of the Illinois Commerce Commission (“Staff Report”) submitted in the above-captioned proceeding after the close of business on March 23, 2001. In response, Blackhawk states as follows:

EXECUTIVE SUMMARY:

**BLACKHAWK HAS SATISFIED THE
RECIPROCITY REQUIREMENTS IN THE PUBLIC UTILITIES ACT**

1. On February 16, 2001 Blackhawk submitted to the Commission its application for a certificate of service authority (“Application”) to operate as an alternative retail electric supplier (“ARES”) in Illinois. On February 20, 2001, proof of Blackhawk’s submission to the Commission was published in the Edwardsville Intelligencer, the official state newspaper.

2. Prior to submission of Blackhawk’s Application, Blackhawk provided the Commission Staff with a confidential copy of a “draft” Application. Based upon the comments of the Commission Staff, some of which addressed issues pertaining to the

reciprocity provisions contained in Section 16-115(d)(5) of the Public Utilities Act (“Act”), Blackhawk provided the Commission Staff with a revised draft of Blackhawk’s Application. (*See* 220 ILCS 5/16-115(d)(5).) After receiving another round of comments from the Commission Staff, and revising its Application accordingly, Blackhawk formally submitted its Application to the Commission.

3. Since the submission of Blackhawk’s application, Blackhawk has responded to three (3) independent requests from the Hearing Examiner for information and/or clarification (“Hearing Examiner’s Requests”) that were served upon Blackhawk on February 27, 2001, March 15, 2001, and March 19, 2001, respectively. Some of the Hearing Examiner’s Requests requested additional information, including workpapers, and the rationale for the demonstration of compliance with the reciprocity provisions in the Act.

4. Without receiving prior notice, on Friday, March 23, 2001 at approximately 4:45 p.m., Blackhawk received an “Official Commission Notice of Case or Proceeding” (“Official Notice”) directing Blackhawk that it had until 4 p.m. on March 27, 2001 to file any verified response to the Staff Report. Upon receipt of the Official Notice, Blackhawk was unaware of the existence of any Staff Report that was to be submitted in the instant proceeding. In fact, at the time of receipt of the Official Notice, Blackhawk had **not** been served with any Staff Report, much less provided with any notice of the impending nature of the filing of a Staff Report.

5. On Friday, March 23, 2001 at approximately 5:26 p.m., **after the close of business**, Blackhawk received an electronic version of the aforementioned Staff Report. The Staff Report was filed without any supporting workpapers or background materials.

6. Preliminarily, Blackhawk objects to the requirement of a formal verified response on less than two (2) business days, especially considering the lack of notice and supporting documentation behind the Staff Report. This schedule prejudices Blackhawk in its efforts to prepare a proper legal and substantive response to the Staff Report and denies Blackhawk its procedural due process rights.

7. Blackhawk further objects to the admission of the Staff Report into the record in the instant proceeding. The provisions of Section 16-115 of the Act govern the instant proceeding. Section 16-115(d) of the Act requires the Commission to grant an application for a certificate of service authority if it makes findings based upon **the verified application and such other information as the applicant may submit.** (*See* 220 ILCS 5/16-115(d).) (Emphasis added.) Section 16-115 of the Act does not allow the Commission to base its decision on information provided by the Commission Staff or any other person. Furthermore, allowing the Staff Report to become a basis for a Commission decision regarding Blackhawk's Application, violates Blackhawk's due process rights and constitutes reversible error.

8. Based upon what had been a Commission approved methodology for demonstration of compliance with the reciprocity provisions of the Act, and in accordance with direction from Staff, Blackhawk used the ComEd PPO market values as a proxy for average market values assuming an average load factor for the customer class. The Commission cannot change its previously-established policy without providing a reasoned analysis supporting a change in policy. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970) cert. denied 403 U.S. 923 (1971). The Staff

Report does not present a legitimate basis upon which the Commission could rely to change its policy.

9. Nevertheless, without waiving and expressly preserving any and all objections regarding form, substance, and/or procedure with respect to the submission of the Staff Report, and the requirement that it respond in less than two (2) business days, Blackhawk provides the instant verified response in accordance with the Official Notice:

**STAFF'S ASSERTIONS ARE
BASED UPON FAULTY ASSUMPTIONS**

10. The Staff Report relies upon a flawed premise that ignores the realities of the marketplace for electric power and energy. The Staff Report relied upon a flawed and mistaken premise in its efforts to find a reason to conclude that Commonwealth Edison Company (“ComEd” or “Edison”) and Illinois Power Company (“Illinois Power”) can economically serve the retail electric customers of Wisconsin Electric.

a. The basic premise for the analysis contained in the Staff Report is that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs. This basic premise simply is not true and demonstrates a lack of understanding and knowledge regarding the marketplace for electric power and energy. Contrary to the implications in the Staff Report, there is a cost for purchasing capacity in the wholesale market.

b. Firm retail customers need to be served by purchasing firm power in the wholesale market, which includes energy and capacity. Depending upon on how the power is purchased and priced, there may be a separate reservation or demand charge for capacity or it may be included in the price for power.

Therefore, contrary to the assertions in the Staff Report, the cost to purchase power in the wholesale market for two customers of the same demand size but different load factors would not be the same.

c. In fact, contrary to the assertions in the Staff Report, the cost to purchase power to supply a customer with a load factor of 80% is much lower on a \$/MWH basis than the cost to purchase power for the same size customer with a load factor of 30%. It appears that one of the reasons for the inaccurate conclusion contained in the Staff Report is Staff's mistaken and improper reliance upon average prices to calculate costs for customers with specific load factors.

**THE ASSERTIONS IN THE
STAFF REPORT REGARDING COMED ARE FLAWED**

11. Contrary to the conclusion in the Staff Report, ComEd cannot economically serve retail customers in WE's service territory. Based upon the methodology accepted by the Commission in its order in the WPS Energy Services ARES certification proceeding, ICC Docket No. 00-0199, Blackhawk utilized the average prices from ComEd's PPO tariff as the market values.

a. The market values contained in ComEd's PPO tariff are based upon average load factors for the customer class. The prices in the PPO tariff do not represent the actual costs that a wholesale purchaser would incur for customers with specific load factors.

b. The analysis contained in the Staff Report, looking at customers with varying load factors, fails to reflect the actual costs that would be incurred at the lower load factors. In order to provide a more appropriate and realistic

analysis of costs that a wholesale purchaser would incur to serve customers at varying load factors, the market prices would need to be adjusted to reflect customer specific load factors. At a minimum, the cost of capacity and transmission need to be adjusted to reflect the actual load factor. In order to serve a retail customer, capacity and firm transmission would need to be purchased to cover the peak demand of the customer.

c. In its application, Blackhawk estimated the current market value of capacity at \$5/kw/month. In its application, Blackhawk demonstrated that the cost of ComEd transmission is \$11,370 per MW/year; and that the cost of Illinois Power transmission is \$8,788 per MW/year. At these prices, capacity and transmission would make up the following portion of the wholesale cost of power and energy at the following load factors:

Table 1

<u>Load Factor</u>	<u>Capacity</u> (\$/MWH)	<u>ComEd Transmission</u> (\$/MWH)	<u>IP Transmission</u> (\$/MWH)
100%	\$ 6.85	\$1.30	\$1.00
90%	\$ 7.61	\$1.44	\$1.11
80%	\$ 8.56	\$1.62	\$1.25
70%	\$ 9.78	\$1.85	\$1.43
60%	\$11.42	\$2.16	\$1.67
50%	\$13.70	\$2.60	\$2.01
40%	\$17.12	\$3.24	\$2.51
30%	\$22.83	\$4.33	\$3.34

12. The Staff Report also fails to appropriately adjust for energy losses for transmission. In its analysis, since energy losses were already included in ComEd's

market energy prices and were not broken out separately, Blackhawk did not calculate them separately. Since the cost for transmission losses are a percentage of the total cost of energy and capacity and the price of capacity increases on a \$/MWH basis as load factor decreases, the cost for each MWH of transmission losses for the lower load factor customers would also increase. Thus, transmission losses would be higher on a \$/MWH basis for lower load factor customers as compared to higher load factor customers.

13. It also appears that the Staff Report failed to properly adjust the energy price, since the average energy price was used. The actual price paid for energy in the marketplace would be based upon the time period when the energy is used. However, unless a specific customer is analyzed with its associated on-peak and off-peak energy usage profile, there are many potential combinations of the on-peak and off-peak energy profiles. Thus, the Staff Report improperly relied upon average energy prices without adjusting for energy usage profiles.

14. The Staff Report incorrectly claimed that Blackhawk calculated a cost of ComEd to serve Cp-1 customers. In the Staff Report, Staff indicates that Blackhawk calculated a cost for ComEd to serve WE's Cp-1 customers to be between \$50.00 and \$54.90 per MWH. As a result, the Staff Report asserts that ComEd could economically serve WE retail customers in the CP-1 rate class at load factors between 40 – 50%. (*See* Staff Report at 2-3.)

a. In its application, Blackhawk calculated the market costs for ComEd to serve Primary High Voltage customers, not Cp-1 customers. (*See* Blackhawk Application, Attachment C at Table 1.) The costs to serve Primary High Voltage Customers were obtained from a cost of service study prepared by

the Wisconsin Public Service Commission. What the Staff Report fails to acknowledge (or even mention) is that the Cp-1 tariff does not contain separate rates to deliver power to Cp-1 customers. Nevertheless, for the purpose of responding to the Staff Report, Blackhawk has calculated separate adjusted market values for each load factor.

b. Contrary to the conclusions contained in the Staff Report, the cost for ComEd to supply each Cp-1 customer is greater for each load factor than the Cp-1 tariff rates. Blackhawk has calculated separate adjusted market values for each load factor. The market values were calculated by taking the baseline market value for an 80% load factor customer and then adjusting the market value for additional or lower capacity and transmission costs at the other load factors. The load-factor adjusted market costs for ComEd to serve WE Primary High Voltage customers would be as illustrated in Table 2 below:

Table 2

Load Factor	CE \$50/MWH market cost to serve WE Primary High Voltage customers, adjusted for load factors	CE \$54/MWH market cost to serve WE Primary High Voltage customers, adjusted for load factors
100%	\$47.96	\$51.96
90%	\$48.87	\$52.87
80%	\$50.00	\$54.00
70%	\$51.45	\$55.45
60%	\$53.39	\$57.39
50%	\$56.11	\$60.11
40%	\$60.18	\$64.18
30%	\$66.97	\$70.97

As demonstrated in Table 2 above, the cost for ComEd to supply Cp-1 customers at each load factor is greater than the Cp-1 cost listed in the Staff Report. Thus, contrary to the assertions contained in the Staff Report, ComEd **cannot** economically supply WE retail electric customers.

15. The Staff Report contains no analysis to support its assertion that since ComEd's incremental costs are lower than its market cost, it could serve even more WE retail customers. The Staff Report summarily, without any demonstration, analysis, or calculation, concludes that since ComEd's incremental costs are lower than its market costs, that ComEd could serve even more WE retail customers. However, as indicated above, a proper and realistic calculation of ComEd's incremental costs would need to be adjusted to account for load factor if the average load factor is not used.

a. Although Blackhawk included an incremental cost comparison with its application, this comparison was included solely based upon a request from Staff. Blackhawk does believe that such a cost comparison is an inappropriate basis upon which to determine if an Illinois electric utility could economically serve retail customers in WE's service territory.

b. It would be uneconomical for ComEd to serve retail customers in WE's service territory, since ComEd could sell the power into the wholesale market at a higher value than selling the power to retail customers. It is improper, illogical, and uneconomic to base the economic analysis upon the assumption that ComEd would not take actions to maximize its profits. The asserted basis for the Staff Report is that ComEd would act contrary to its own economic self-interest. There is no basis for this assumption in the Staff Report.

c. In addition, there are other costs ComEd would be exposed to if it were to sell power to retail customers that would not exist in the wholesale market. ComEd would be exposed to potentially costly energy imbalance costs if it served retail customers in WE's service territory. The Staff Report improperly fails to recognize the fact that these costs are even more risky for lower load factor customers where the uncertainty and timing of the actual load, by definition, is less predictable.

16. Contrary to the conclusion in the Staff Report, Illinois Power cannot economically serve retail customers in WE's service territory. The Staff Report inaccurately and improperly concludes that Illinois Power would be able to serve WE Cp-1 customers with load factors of less than 50%, using the same flawed logic as relied upon for ComEd. (See Staff Report at 3.) Again, the Staff Report improperly relies upon an "apples to oranges" comparison that mixes average costs with actual costs Illinois Power would incur to provide power to the lower load factor customers. Again, the Staff Report misrepresents the calculations utilized in Blackhawk's application.

a. Contrary to the assertions at page 3 of the Staff Report, Blackhawk actually calculated the market costs for Illinois Power to serve Primary High Voltage customers and Commercial TOU customers, not Cp-1 or Cg-3 customers. The costs to serve Primary High Voltage Customers and Commercial TOU customers were obtained from a cost of service study prepared by the Wisconsin Public Service Commission since the Cp-1 and Cg-3 tariffs do not contain separate rates to deliver power to Cp-1 or Cg-3 customers.

b. In Table 3 below, Blackhawk has recalculated IP’s NFF derived market cost of \$48.95 per MWH (the calculated IP market cost to serve certain Primary High Voltage customers referenced in the Staff Report in Paragraph 6) in the same manner as Table 2 above to reflect the actual costs associated with varying load factors.

Table 3

Load Factor	IP \$48.95/MWH Cost to serve WE Primary High Voltage customers, adjusted for load factor (\$/MWH)
100%	\$46.66
90%	\$47.68
80%	\$48.95
70%	\$50.58
60%	\$52.76
50%	\$55.81
40%	\$60.39
30%	\$68.01

c. As demonstrated in Table 3 above, for each load factor, the cost for IP to supply each Cp-1 customer at each load factor is greater than the Cp-1 cost listed in the Staff Report. Therefore, contrary to the assertions contained in the Staff Report, Illinois Power is **not** able to economically supply electric power and energy to WE retail customers.

d. The Staff Report incorrectly concludes that Illinois Power could purchase power from ComEd to economically deliver power to WE’s retail customers. As an initial matter, this analysis is improper as a matter of law. *See* 220 ILCS 5/115. The statute provides that it must be both “physically and economically” possible for the Illinois electric utility to deliver electric power and energy into the service area of an applicant’s utility affiliate. By suggesting that

the Illinois electric utility may merely purchase the electricity from a neighboring utility and wheel it into the service area of the applicant's affiliate, the interpretation offered by Staff would render the term "physically" a nullity. That is, the Illinois electric utility would always be able to physically deliver the electric power and energy into the service area of the applicant's utility affiliate. Such a result is contrary to the basic principles of statutory construction and would constitute reversible error. *See Patterson v. City of Peoria*, 386 Ill. 460, 463 (1944).

e. Moreover, the Staff Report relies upon a flawed analysis and unsupported analysis to incorrectly conclude that Illinois Power could purchase power to economically serve WE Cp-1 and Cg-3 customers. As demonstrated above in Table 2 above, IP would not be able to economically deliver power to WE Cp-1 customers. If IP purchased power from ComEd, it would presumably incur the same costs as those shown in Table 2. The costs in Table 2 are greater than the Cp-1 average costs that are contained in the Staff Report for each load factor. Thus, contrary to the unsupported assertions in the Staff Report, Illinois Power cannot economically deliver power to WE Cp-1 customers.

f. Additionally, the Staff Report relies upon the same mistaken logic to assert that Illinois Power could serve Cg-3 customers economically if it purchased power from ComEd and delivered it to WE's retail customers. However, the Staff Report fails to include load factor adjusted costs associated with serving Cg-3 customers. The Staff Report indicates that Blackhawk calculated a market value of \$61.89 for Cg-3 customers. However, as stated

above, Blackhawk calculated a cost to supply Commercial TOU customers using a cost of service study.

g. In its filing, Blackhawk indicated in Attachment C, Table C-7, that a WE Commercial TOU customer with a 60% load factor would have a rate of \$51.38/MWH. The filing also indicated that the market price for IP to serve this type of customer (using NFF values as the basis for market prices) would be \$61.89/MWH. If IP purchased power from ComEd, the cost of the power would need to be adjusted for the actual load factor and for the WE delivery costs of the Commercial TOU customer. Assuming IP purchased power from ComEd, using a market price of \$50/MWH for an 80% load-factor customer, the market price of power for a 60% load factor customer would be \$53.39, per Table 2. The WE delivery costs for a Primary High Voltage customer from Table C-1 of Blackhawk's initial filing is \$12.07 per MWH. The WE delivery costs for the Commercial TOU customer from Table C-7 of Blackhawk's initial filing is \$21.06 per MWH. Thus, the actual cost for IP to purchase ComEd wholesale power and deliver it to a WE Commercial TOU customer with a 60% load factor would be \$62.38/MWH. The comparable cost the Commercial TOU customer pays WE for electric power and energy is currently \$51.38/MWH. Illinois Power cannot economically deliver power to the Commercial TOU customers by purchasing power from ComEd.

CONCLUSION

17. The Commission has concluded that as long as an ARES Applicant can demonstrate that it is either uneconomical or physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant can meet the reciprocity requirements in the Act. (*See, Wisconsin Public Service Energy Services, Inc., Application for a Certificate of Service Authority as an Alternative Retail Electric Supplier, Docket 00-0199, Order at 9.*) throughout the instant proceeding, Blackhawk has demonstrated that it complies with the reciprocity requirements of the Act because electric power and energy cannot be economically delivered from the service territories of Commonwealth Edison Company (“Edison”) and Illinois Power Company (“Illinois Power” or “IP”) to serve retail load in the service areas of Blackhawk’s utility affiliates.

a. In Docket No. 00-0199, the Commission found that WPS-ESI was able to demonstrate that certain Illinois utilities could not economically deliver electric power and energy to WPS-ESI affiliates under current market conditions. The Commission also concluded that since it was uneconomical for certain Illinois utilities to deliver electric power and energy to WPS-ESI utility affiliates, that it was unnecessary for WPS-ESI to also demonstrate that it is physically impossible to deliver electric power and energy to such affiliates at this time.

b. Thus, in Docket No. 00-0199, the Commission determined that as long as an ARES Applicant can demonstrate that it is **either** uneconomical **or** physically impossible for an Illinois electric utility to deliver electric power and energy to retail customers of an out-of-state utility affiliate, the ARES Applicant

can meet the requirements of Section 16-115(d)(5) of the Act. (*See* 220 ILCS 5/16-115(d)(5).)

c. Likewise, Blackhawk has demonstrated that it is uneconomical for Edison and Illinois Power to deliver electric power and energy to retail customers of Blackhawk's affiliates' WE and Edison Sault. Blackhawk relied upon the identical methodology used by WPS-ESI to demonstrate that it is uneconomical. In addition, Blackhawk calculated the total cost to deliver electric power and energy to retail customers of WE and Edison Sault by using the same cost components that the Commission accepted in the WPS-ESI application.

WHEREFORE, Blackhawk Energy Services, L.L.C. respectfully requests that the Commission strike the Staff Report and grant Blackhawk's application for service authority to serve non-residential retail electric users with an annual consumption of 15,000 kWh or more in the Commonwealth Edison and Illinois Power service territories.

Respectfully submitted,

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